

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No: 150857

Court of Appeals No. 314579

V

Circuit Court No. 11-565-FC

YUMAR A. BURKS,

Defendant-Appellant.

_____!

PEOPLE'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. WAS THERE SUFFICIENT EVIDENCE BEFORE THE JURY TO SUSTAIN A CONVICTION FOR CHILD ABUSE, FIRST DEGREE?

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

II. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT REFUSED TO INSTRUCT THE JURY ON THE CHARGE OF CHILD ABUSE, SECOND DEGREE?

Plaintiff-Appellee answers, "No."

Defendant-Appellant answers, "Yes."

COUNTER STATEMENT OF APPELLATE JURISDICTION

This is an appeal of right following a jury trial conviction in the 30th Circuit Court on September 25, 2012 and sentencing, which occurred on October 24, 2012. The Court of Appeals ultimately affirmed his convictions in an opinion dated December 2, 2014. Defendant filed the present application for leave to appeal on January 16, 2015.

Therefore, this Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(2).

COUNTER STATEMENT OF FACTS

Defendant was convicted of Felony Murder¹ and Child Abuse in the First degree² following a six-day jury trial. The murder victim was Defendant's six-month old son, Antonio Yumar Burks.

The trial began on September 18, 2012 with the testimony of paramedic **Nathan Gates**. On March 25, 2011 at about 10:30 a.m., he was dispatched to 1261 Deerpath, in East Lansing on a report of an infant who was not breathing. When he arrived in an ambulance Mr. Gates took over CPR from two police officers who been working on the infant. (Tr. 9/18/12, pp 4-10) He picked up the child and went immediately to the ambulance. He continued CPR while he carried the child to get him to a hospital as quickly as possible. The child had no measurable electrical activity in the heart and was not breathing. He was six months old and weighed around 20 pounds. Mr. Gates noticed that the child was very cold and had bruises on his slightly distended abdomen. He never got any response from the child. (Id. pp 11-14). Mr. Gates testified that it would be important to know about accidents or medical problems of the child. Mr. Gates spoke with Defendant at the hospital and he told Mr. Gates that he checked the child at 2300 hours and the child was fine. He did not mention any recent accidents or health history. (Id. pp 12-13)

Paramedic **Peter Counseller** also responded to the same call. He had been with the East Lansing Fire Department for 18 years and was the most experience first –

¹ Contrary to MCL 750.316-B

² Contrary to MCL 750.136B2

responder that day. (Id. pp 27, 38) When he arrived at the scene, he saw Medic Gates coming down the stairs from the home with a limp, lifeless African-American infant in his arms. The child did not appear to be spontaneously breathing. They initiated procedures for a pediatric arrest in the ambulance. The child was asystole³. They tried to open an airway and also tried to start an IV. They were unable to do these procedures. The child never had a heartbeat and was cold. He had never seen a child so cold in all his 20 years. He noticed more than 10 bruises on the child's distended abdomen. When the diaper was off Mr. Counseller noticed that the baby was freshly powdered and completely dry. He found this to be odd because when someone dies the bowel and bladder releases. Instead of a dirty diaper Mr. Counseller found the opposite. (Id. pp 27-36) Mr. Counseller also noticed that the child's fontanel, which he described as the soft spot on an infant's skull, was sunken, even when the child was laying horizontal. He stated that this, along with the cold body temperature and other signs, such as lack of pulse, heartbeat and cloudy eyes indicated the child was dead. (Id. pp 33-42) He also observed that the child's frenulum, which is tissue that connects the top lip to the gum, was torn. (Id. p 39) None of the injuries which Mr. Counseller observed were caused by the efforts of the ambulance crew while performing CPR on the child.

Two East Lansing Police officers were the first responders on the scene. **Lt. Scott Wriggelsworth** arrived at about the same time as Officer Scott Sexton. (Id. p 66) This was a two story apartment building and Defendant was in the second floor window above the door screaming at the police. The front door was closed and locked. Lt. Wriggelsworth tried unsuccessfully to kick down the door open, but it was eventually

³ "Asystole" means no pulse.

opened by a nearby maintenance worker. (Id. pp 64-66) He ran upstairs and saw the mother, Sheretta Lee on the stairs. The baby was on a mattress on the floor and Defendant was on top of him, giving him full adult CPR chest compressions. Lt. Wriggelsworth pulled Defendant away and he began doing two-finger compressions while Officer Sexton did breaths. (Id. pp 69-72) The baby was cold to the touch, had no color, and appeared to be dead. (Id. p 73) The father was in the bedroom "going crazy", yelling at the top of his lungs and destroying the room. He was tearing pictures off the walls and ripped down the blinds. Officer Sexton calmed him down. (Id. p 74) When the medics arrived three to four minutes later, they grabbed the child and were gone. Defendant did not say anything to Lt. Wriggelsworth about an accident involving the child. (Id. pp 74-75, 85)

Officer Sexton took Defendant to the hospital. (Id. p 79) There were two other young children present and Sheretta Lee found someone to watch them. She was given a ride to the hospital later. Ms. Lee had called 9-1-1. (Id. pp 79-82) Lt. Wriggelsworth noticed a lack of emotion from the mother. (Id. p 87)

Lt. Wriggelsworth regarded the apartment as a crime scene. He had the scene secured until the police obtained consent to search. (Id. pp 78, 81) Lt. Wriggelsworth testified that the dispatchers are trained to give CPR instructions over the phone. He also noted that the temperature of the apartment was not cold. (Id. pp 83-84)

Officer Sexton testified that when he arrived at the Deerpath apartment Defendant was hanging out of the top window frantically waving his arms. (Id. pp 95-96) He too saw Defendant doing adult CPR on the baby's chest. He and Lt. Wriggelsworth performed infant CPR, with Officer Sexton doing the breathing. The baby was very cold.

Offier Sexton saw injuries which were not where Defendant had his hands when he was doing CPR. He saw bruising on the baby's cheeks and around the naval area and a gouge the size of a penny on the left rib cage. (Id. pp 98-104) While they were doing CPR they were distracted by Defendant who was punching holes in the drywall.(Id. p 106)

Officer Sexton drove Defendant to the hospital behind the ambulance. Defendant sat in the front seat with him. Defendant was upset, screaming into his phone and crying. The most Officer Sexton could get from Defendant was that he gave the baby a bath and bottle around 11 and put the baby to bed. Defendant did not say anything about the baby being under water. (Id. pp 107-109)

While at the hospital, Officer Sexton was informed privately by a nurse and hospital security that because of the temperature of and injuries to the baby they wanted Defendant to stay in the waiting area. (Id. p 110) Later, Officer Sexton and Defendant were allowed in the treatment room. They watched for at least 15-20 minutes while medical personnel worked on the baby. Defendant did not mention any health information to the medical staff. When Defendant was informed that Antonio was dead he began yelling and struggling with Officer Sexton and the security staff. It took Officer Sexton and 4-5 security guards to restrain Defendant. He was strapped to a gurney until he calmed down. He was eventually released and waited in a room with the mother Sheretta Lee for about 10-15 minutes. (Id. p 112-114, 127)

The doctor showed Officer Sexton injuries on Antonio's body: bruising on both cheeks, 10-12 bruises in the naval area, a small gouge on the left rib cage, a bruise on his back and a small laceration on the back of his head. The doctor also showed Officer

Sexton Antonio's mouth where the tissue that attaches the top lip to the gums had been ripped and detached from the gum. (Id. pp 115-116)

Officer Sexton spoke to Sheretta Lee at the hospital. Officer Sexton gave Ms. Lee a ride from the hospital to the police station. She was coherent, cooperative and answered questions. She also gave consent for the search of the residence. (Id. pp 117-118)

Detective **Candace Ivey** took photos of the two – story townhouse where the incident occurred. She described the layout and what she observed. She saw a baby bath tub inside the regular bath tub. There was no water in either tub. She did not find any evidence of blood or body fluids. (Id. pp 133-141) She took the photos between 4 and 5 p.m. on March 25, 2011. (Id. p 152) Detective Ivey noted that the temperature in the home was set at 73 degrees and it felt like 73 degrees. She also noted that the bedroom window was open. (Id. pp 147-148)

Brianna Nielson also testified on the first trial day. She was an 18 year old student who knew Defendant through a mutual friend. She babysat for a child at the apartment next to Defendant's home. (Id. pp 19-20) She knew the two little boys but didn't know about the baby. Defendant was like a 'big brother' to her and she talked to him. (Id. pp 20-22) At the time of the incident she was 16 and a student at East Lansing High School.

On March 24, 2011 she was on the school bus after school and she talked to Defendant. She got out of school at 2:55 and arrived home around 3:30. She called Defendant and he said he would call her back, but he never did. (Id. pp 22-23) She called him again several hours later. It was still light outside. He answered the phone

and he was crying. Defendant said something was wrong and he had to get to the hospital and he hung up. He was very frantic, crying and hard to understand. (Id. p 24) She called him back multiple times but he did not answer.(Id. p 25) She reviewed the phone records with Detective Phelps and had no reason to dispute the times of her calls as contained in those records.⁴ (Id. p 26)

On the second day of trial, the jury heard from **Dr. Martin Romero**, a board certified emergency room physician. Dr. Romero was the attending emergency room physician on March 25, 2011 when Antonio Burks was brought to Sparrow Hospital. (Tr. 9/20/12, pp 4-9) When he first saw Antonio he had no movement, no respiration and no pulse. Antonio was receiving CPR and his staff assumed care of him from the EMS squad. (Id. pp 10-12) It would have been important to know information about medications, injuries or illnesses of the child because it can affect how the trauma is managed. (Id. pp 11-12) The father was in the treatment room. If he had told Dr. Romero about an accident he would have listened to him. Defendant said nothing about an accident. (Id. p 21)

Dr. Romero described injuries he found on Antonio. On his head Dr. Romero found a healing abrasion. He found multiple bruises and abrasions on the face. An oral examination revealed that the tag of skin between the top lip and gum, called the frenulum, was torn. There was bruising on the gum line. There were very small areas of bruising on the neck. Dr. Romero saw "Cullen's sign" which is a purple coloration

⁴ According to cell phone records obtained by Sgt. Phelps, there was a call from Ms. Nielson to Defendant on March 24, 2011 at 3:26 which lasted for 14 seconds. Ms. Nielson called Defendant again that day at 5:05 p.m. and the call lasted 585 seconds. Ms. Nielson called Defendant again that day at 6:18 p.m. and 9:36 p.m. and both calls went to voicemail. (Tr. 9/20/12, p 94)

around the umbilicus which indicates internal bleeding and is seen in motorcycle accidents. There was extensive bruising on the abdomen. The bruising on the abdomen was “more recent”. On the arms there were a couple areas of resolving bruising. Dr. Romero did not observe any external genital trauma but found extensive bruising on both legs. (Id. pp 14-15, 31-33)

Dr. Romero noted that Antonio’s core temperature was so low that it didn’t register on the ER thermometer, which goes down to 92 degrees. (Id. pp 17, 55) Anything lower than 92 is “inconsistent with life”. (Id. p 55) He tried unsuccessfully to warm Antonio. They worked on him for 40 – 60 minutes but never saw a response from Antonio. Based on this lack of responsiveness, lack of corneal reflection, the beginning of opacification of the corneas, and Antonio’s low temperature, Dr. Romero decided to stop trying to resuscitate him. Based on these factors, Dr. Romero estimated that Antonio had been without circulation for a prolonged period of time, which he estimated at from 4-6 hours up to 12 or even 24 hours. (Id. pp 21-25, 53) At some point, Dr. Romero concluded that the child had internal injuries, but he did not use any equipment to evaluate the child’s internal organs because they had been unable to resuscitate him. (Id. p 46) Rigor had not set in yet. That usually takes from 12 – 72 hours to occur. (Id. p 45)

Dr. Romero testified that the injuries he saw on Antonio were inconsistent with injuries caused by inappropriately administered CPR. Such injuries are most commonly broken ribs. He had never seen abdominal injuries from inappropriate CPR and he testified that such injuries were unlikely because the abdomen has enough “bounce” that it doesn’t cause injury. Abdominal injuries are caused by “blunt force trauma”. The

injuries to the face and to the frenulum were inconsistent with any form of CPR. (Id. pp 34-36) It was Dr. Romero's opinion that it was very unlikely that the injuries he saw were caused by improper administration of CPR. (Id. p 47)

Dr. Romero saw no other bodily fluids around Antonio's nose or mouth. He did not see any feces or urine on Antonio or in his diaper. He testified that stool in the rectal vault and urine in the bladder will be expelled at the time of death. He noted that at the time the EMS found Antonio his diaper was clean, which showed that the child had been cleaned. Dr. Romero characterized that as "atypical". (Id. pp 37-39)

Travis Parris testified that he knows Defendant as a neighbor from the Deerpath apartments. Defendant lived a "10 second" walk away from Mr. Parris. They talked about games and played video games together at each other's homes. (Id. pp 58-62) On March 24, 2011 Defendant was at Mr. Parris' home playing video games. No one was with Defendant. It was daylight when Defendant was there, around 5 p.m. Defendant left after a couple hours to check on his baby. Mr. Parris told him to do it. Mr. Parris had three children and said he would not leave his own baby alone. It was daytime when Defendant left, around 7 or 8. Mr. Parris was not really sure of the times. He expected Defendant to come back and finish their game. He kept calling Defendant. (Id. pp 63-67) Mr. Parris went over the phone records with a police officer and they accurately reflected the times.⁵ (Id. p 86)

⁵ According to the testimony of Detective Phelps, the first call between the two occurred at 11:46 a.m. when Travis Parris called Defendant and the call went into voice-mail. Defendant tried to call Mr. Travis at 1:22 p.m. and 1:45 p.m. with no answer. At 3:07 Mr. Parris called and spoke to Defendant for nine seconds. There was a succession of very brief conversations prior to 3:30 p.m. Between 3:30 and 5:50 there were no calls between Defendant and Mr. Parris. At 5:50 Defendant called Mr. Parris and the call lasted 156 seconds. This was the longest call. Defendant called Mr. Parris at 7:30, 9:27, 10:40, 11:45 and 1:35 a.m. Mr. Parris called Defendant at 10:00, 11:44 and 1:29 a.m. (Tr.9/20/12 pp 95-99)

When Defendant came back to Mr. Parris' home, it was around 12 that night. It was dark out. When he came back he didn't play games, he just sat on the couch. This was not normal. Mr. Parris thought Defendant stayed until his wife got home. The baby was not with him (Id. p 63) Mr. Parris believed that Sheretta arrived home around 2 or 3 a.m. and that Defendant stayed at Mr. Parris' home for another 3-4 hours. (Id. pp 77-78)

Defendant had brought the baby to Mr. Parris' home, but not on the 24th. Mr. Parris had seen Antonio three times and never saw bruises on him. He said Antonio was not a happy baby. (Id. pp 74-82) He saw the medics carry the baby out of the house and the baby was not moving. (Id. p 84)

The jury next heard from **Sheretta Lee**, former wife of Defendant and mother of the victim, Antonio Burks. Ms. Lee married Defendant on February 27, 2010. Antonio was not a planned baby and Defendant wanted Ms. Lee to have an abortion, but she refused. They decided together to have Antonio. He was born on August 26, 2010. She has two other sons who are not Defendant's children. (Id. pp 102-105)

When Antonio was born Ms. Lee was the only one working. She worked at Quality Dairy and did not take time off after the birth. (Id. pp 105-106) She became a Certified Nurse Assistant and in March took a job in a nursing home in Dimondale. She worked from 3 to 11 p.m.. Ms. Lee did not want to overburden Defendant with the older two boys, so she took them to daycare which was financed by DHS. Defendant watched Antonio. Ms. Lee dropped the boys off at day care on her way to Dimondale and her mother picked them up at 4:30 and kept them at her house. Ms. Lee then picked the boys up from her mother on her way home from Dimondale and the three of them got home around midnight. (Id. pp 107-111)

Prior to Antonio's death, Defendant had talked to Ms. Lee about the stress he was feeling. He was frustrated that he couldn't find a job and provide for the family. Several weeks before Antonio's death, Defendant was driving her to work at Quality Dairy. Ms. Lee, Antonio and her son Keith were in the car. Defendant was talking about dropping her and the kids off and driving the truck off a cliff. He was acting wild, swerving the car and talking in a loud, angry voice. Ms. Lee was shaking when she got out of the car at her job. She was going to take the boys out of the car but Defendant drove off, leaving skid marks. She was terrified for the children and her supervisor called the police. The police followed up and the children were not harmed. (Id. pp 112-116)

Ms. Lee noticed the cut on Antonio's head and she thought it was an accident caused by laying Antonio on one of the other boys' blocks.(Id. pp 117-118, 176) Defendant began giving Antonio hickies on his cheeks when he was three months old. She told him not to do that but Defendant said he was just playing with him. No one else did that to Antonio's cheeks. Prior to his death, Ms. Lee had never seen Defendant slap or punch Antonio. She was not aware of Antonio falling off a bed. (Id. pp 119-120)

Ms. Lee showed Defendant how to bathe, feed and change the baby. Antonio had an infant tub. She told Defendant that babies have lots of needs and explained about how to rock him, help him with gas, rub his back and check to see if he's wet. There were times when Antonio would cry and Defendant would say "let him cry, he is fine" and Ms. Lee would tell him that wasn't true and that the baby had needs. Defendant would get frustrated when he tried to get Antonio to stop crying and he would say "I can't do this". At that point, Ms. Lee would take over or she would ask a friend to

watch the baby. Antonio cried a lot and she and Defendant argued about money a lot. They had financial problems. (Id. pp 122-126)

On the morning of March 24, 2011 Ms. Lee got up and fed everyone breakfast. She left for work at 2:00 p.m, taking the two older boys with her to drop off at day care. Before she left for work Defendant expressed his frustration with the “temp” employment agency he was working with and punched holes in the walls. He told Ms. Lee ‘that could have been you’. He was angry, but became calmer. She asked him if he was okay to care for Antonio and he said he was. That was the last time she saw Antonio alive. She dropped the older boys off at day care and went to work. (Id. pp 127-130) Ms. Lee left work at 11:00 p.m. and picked up her two sons. When she got home she called Defendant to have him come out and help her carry in the sleeping boys. He grabbed Jayden and rushed into the house, and put Jayden in bed without taking off his coat or shoes. This was unusual. (Id. pp 133-135) Defendant warned her not to wake the baby. She described his mood as “panic”. (Id. pp 136-137) She did not touch Antonio at that time. (Id. p 163) Antonio was on the mattress on the floor in the dark bedroom, with covers on him.(Id.) Defendant said he was going to Travis’ house to finish his game. Ms. Lee was tired and went to bed. (Id. p 138)

Ms. Lee heard Defendant pacing in the room around 3:00 a.m. and she thought he was taking care of Antonio. She woke up around 8 and realized Antonio wasn’t crying. She heard the other kids downstairs and assumed Antonio was downstairs with them. She went back to sleep and woke up around 10. Defendant was in the room. Ms. Lee touched Antonio and he was very cold. (Id. pp 140-144)

When she felt how cold Antonio was Ms. Lee went into shock. She thought he might have passed away. She “froze”. Defendant turned him over and lifted his onesie. Antonio had bruising all over his body. Ms. Lee had bathed him before going to work the previous day and he wasn’t bruised then. (Id. pp 150) There was nothing wrong with him then. She was confused. Defendant was screaming and yelling. She called 9-1-1. They were telling her how to do infant CPR but Defendant was doing adult CPR. She told him to stop because he was going to crush Antonio’s ribs. She told Defendant to use two fingers. He didn’t listen. The bruises were there before Defendant tried to do CPR. (Id. pp 152-154) The police took over CPR when they arrived. (Id. p 155) The medics came and took Antonio. She had seen people who passed away due to her work. She knew he was gone; she didn’t think he was alive. (Id. pp 155-156) Ms. Lee got her mom to watch the older boys. When she arrived at the hospital the nurse told her she was sorry that her son had passed away. Defendant was in restraints. She was never alone with him at the hospital. (Id. pp 158-159)

Ms. Lee was interviewed by the police. She was feeling confused and lost. She knew she was a suspect due to the questions they asked her. At the time of her testimony she was much clearer. (Id. p 161) Defendant was the only one who had the care and custody of Antonio. She did not harm Antonio. He was fine when she last saw him on March 24th. (Id. p 164)

On cross examination Ms. Lee was impeached with some statements she had made to the police on March 25th about her observations of Antonio when she got home from work. (Id. pp 170, 181) She was also impeached with inconsistencies in her testimony about calling Defendant from work on March 24th. (Id p 180)

Dr. John Bechinski testified that he was a forensic pathologist at Sparrow Hospital and was qualified as an expert in that field. He performed an autopsy on Antonio Burks.

Dr. Bechinski first described his external examination. Antonio Burks was six months old, 27 inches long and weighed 14 pounds. (Id. pp 208, 223) Dr. Bechinski did not observe any bodily fluids on his body. (Id. p 211) He also observed the following injuries, which he documented with photographs: a linear scrape on his right forehead; a purple bruise on the right temporal scalp; a purple bruise on the right cheek; a contusion on the left upper lip; the frenulum, which attaches the gums to the upper lip, was torn and next to it was a bluish purple bruise; at least 20 round oval irregularly shaped bruises on his chest and abdomen (arranged in almost a vertical fashion); two oval purple bruises on the lower back; and a bruise on the front upper left thigh.(Id. p 217)

Dr. Bechinski testified that a torn frenulum is seen in suffocation deaths, when someone attempts to suffocate another person and the amount of force used can cause such tearing. It's possible that it was caused by someone trying to keep a crying child quiet. (Id. p 220) He characterized it as an uncommon child abuse injury, but one which he sees more in children than in adults. (Id. p 221) The bruising pattern he saw on Antonio is one which he sees when individuals pick up an infant with their hands and apply pressure with their fingertips, causing contusions. They could also be inflicted with knuckles. (Id. pp 221-222) He testified that the photos of Antonio's injuries were "textbook battered child photos". (Id. p 223)

Dr. Bechinski also testified about his internal examination of Antonio Burks. He began with the head, where he found two areas of bleeding: under the right temporal

scalp and also under the scalp on the frontal region. (Id. pp 224-226). Next, Dr. Bechinski discovered a full thickness tear of the superior vena cava, which he explained is the main vein that returns blood from the head to the upper extremities and back to the heart. He found bleeding next to the tear and in the cavity surrounding the heart. These are the types of injuries commonly seen in high-speed motor vehicle collisions. It requires a lot of force to produce these injuries. This injury alone was enough to cause death. (Id. pp 227-228) He found injuries on other organs as well. There were:

“[b]ruises on the surface of the lungs. Also evidence of bleeding within the lungs. There was evidence of bleeding near the site of the right lung where the main blood vessels enter and exit the lungs, as well as the bronchus enters the lung to take air into it. There were two lacerations on the right lobe of the liver. A laceration inside the left lobe of the liver. And an additional laceration on the left lobe of the liver. So a total of four tears of the liver were present. There were two lacerations on the spleen. There was associated evidence of bleeding into the abdominal cavity. The left testicles (sic) was surrounded by thick hemorrhage. There were additional bruises present on the diaphragm, on the thymus, on the ascending and transverse colon as well as the duodenum, which is the first part of the small intestine. The right adrenal gland was pulpified, meaning it was fragmented. And there was evidence of bleeding around the right adrenal gland.” (Id. pp 228-229)

Dr. Bechinski explained that the liver is on the upper right part of the abdomen and the spleen is on the upper left. There would have been impacts to both sides of the body to cause those injuries. He testified that these injuries were the result of blunt force trauma, like a high speed collision. (Id. pp 231-234) These were life – threatening injuries which would necessitate immediate medical treatment. (Id.) A baby with these injuries would become fussy and then become unresponsive due to blood loss. It was possible that blood coming from the trachea and lungs could come out of the baby’s mouth and nose. (Id. p 233)

Dr. Bechinski also had toxicology screens done to rule out other possible causes of death. These screens were negative. Dr. Bechinski concluded that the cause of death was multiple blunt force trauma and the manner of death was homicide. He also testified that injuries inflicted by inappropriate CPR would not affect the head, testicles or legs. Such injuries might involve some bruises, scrapes and rib fractures, although he noted that the ribs of children are more elastic than adults. It was his conclusion that the injuries he saw on Antonio Burks were not from inappropriate CPR. (Id. pp 237-238) The injuries could not have resulted from inappropriate CPR after the child died. Bruises and lacerations with associated hemorrhage indicate that there is blood pressure at the time the injury is sustained and could not have happened after death. (Id. pp 245-246) He said that the injuries he saw could have been caused by squeezing, punching, shaking or striking a wall. (Id. p 240)

The final prosecution witness was Detective Sheriff Fadly, formerly with the East Lansing Police Department. (Tr. 9/21/12) Detective Fadly interviewed Defendant three times. The first time was on March 25, 2011. The interview was video taped and took place in an interview room at the East Lansing Police Department. Defendant was not under arrest and could leave at any time. (Id. pp 23, 27-29) The first interview was admitted as People's Exhibit 26 and played for the jury. During the first interview Defendant only admitted that he had made a mark on his son's cheek by giving him hickies, that he had slapped Antonio and that he pinched Antonio's inner thighs and told him to "hush". (Tr. 9/24/12, pp 13-16) These injuries were consistent with Antonio's external injuries but not consistent with all of his injuries. (Id. p 78)

Detective Fadly learned about the findings of the pathologist on March 26, 2011. Due to information about a disturbance between Defendant and Sheretta Lee and based on the information from the pathologist, the East Lansing Police arrested Defendant on March 26th, which was a Saturday. Defendant requested to speak to Detective Fadly, who came in on his day off to interview Defendant. The interview took place in the same interview room. This time Defendant was advised of his Miranda rights.⁶ (Id. pp 18-20) Defendant told Detective Fadly that he talked to his family and they told him to change his statement because he was "throwing his life away." (Id p 24) Defendant said he wanted to change his earlier statement that he bit and suck to just sucking on Antonio. He said he didn't slap Antonio but that he was always gentle. He gave Antonio a bath but didn't leave him alone for five minutes but only for a few seconds. (Id. pp 28-29) Detective Fadly told Defendant he didn't believe him. Defendant talked to Detective Fadly for six hours and told him Antonio had fallen out of bed on five separate occasions, beginning in the third week of February and ending on March 23, 2011. (Id. pp 30-33) Defendant said his son did not die in the bath. (Id. p 34) Detective Fadly concluded the interview because Defendant had told the five stories and was not saying anything new. (Id. p 35) Detective Fadly did not think the falls described by Defendant caused the injuries outlined in the pathologist's report. He just let Defendant talk. He did not think Defendant was telling the truth. (Id. pp87-89)

Detective Fadly reviewed the full pathologist report and discussed all of the injuries with his colleague and concluded that the internal injuries were not consistent with what Defendant was telling him. (Id. pp 35-36) He decided to question Defendant

⁶ *Miranda v Arizona*, 384 US 436 (1966)

one more time and told him they were going to pick up his wife Sheretta Lee for questioning. She was a suspect at that time (Id. pp 37-38, 40) Once again, Detective Fadly read Defendant his Miranda warnings and Defendant waived his rights and agreed to speak to him.(Id. pp 38-39)

Detective Fadly testified about the inconsistent information that Defendant told him about visiting his neighbor Travis Parris. During the first interview on March 25, Defendant said he had gone to Travis' home three times on March 24th and that Antonio was with one of those times. The next story Defendant told about his visits with Travis, were that he went to Travis' home three times, did not take Antonio with him and during his second visit at the Parris home he smoked marijuana. (Id. pp 43-44)

During the March 28th interview, Defendant said he was home after his second visit to Parris' home. He had smoked marijuana at Parris' home. At about 10:00 p.m. he was laying on the bed with Antonio while the baby drank a bottle. Antonio was laying on defendant's left side. He covered Antonio's head with a blanket while Defendant watched the Cartoon Network. Defendant claimed he fell asleep and rolled over onto Antonio. Defendant demonstrated this, but indicated that he rolled to his right, which was not the side Antonio was laying on. (Id, pp 43-45)

Defendant said he was laying on Antonio for 15 minutes. (Id. pp 45-46) When he woke up Antonio was gasping for air and his eyes were rolling back in his head and he panicked. He started to go crazy. He said he shook Antonio to wake him. (Id. pp 46-47) He then attempted to revive him by punching his right side and then his left side repeatedly, approximately 15 times. He was pushing with the heel of his palm. (Id. pp 47-48) Antonio did not react to these attempts to revive him. (Id. p 49)

Defendant then put Antonio in the bathtub. He kept telling Antonio to breathe, but he got no reaction. Defendant hit him in the face and shook his face. While he was shaking him, Antonio slipped out of his hands and fell onto his ribs on the side of the bathtub and then flopped onto the floor. (Id. pp 49-50) Defendant never called 9-1-1 for help. He wanted to be a good father and be the one to 'bring him back'. (Id. pp 50-51) Defendant said at this point the baby was laying on the floor and his leg was shaking. (Id. p 52) He grabbed the baby and ran into the bedroom. Defendant told Detective Fadly that there was blood and stool coming out of the baby's mouth. (Id) Antonio kept shaking. Defendant kept telling him to breathe. He wiped him down, put powder and Vaseline on him and put a diaper and a onesie on him. (Id. p 53)

Defendant still did not call 9-1-1. He was worried about what his family would think. He loved Antonio. He put him to bed. He didn't tell his wife. He was hoping that Antonio would be okay and in the morning they would just take him to Ready-Care. (Id. pp 53-55) When Defendant was talking to Detective Fadly he kept vacillating between saying that he thought Antonio was fine to saying he thought Antonio was starting to die or that he thought he was dead. (Id. p 55)

Defendant told Detective Fadly that he had been dishonest because he wondered what his family and community would say. He also thought he would go to jail for the rest of his life. He claimed it was an accident. (Id. p 62) Defendant also told Detective Fadly 'You got your man. You got your baby killer. Let's get this done.' (Id. pp 117-118) The People rested their case (Id. p 119) and the trial court denied Defendant's Motion for Directed Verdict. (Id. pp 123-125)

Defendant Yumar Antonio Burks then took the witness stand. He testified that he had completed three years at Alabama State University and moved to Michigan to be with his wife. (Id. p 132) Defendant said his son Antonio Burks passed away on March 25, 2011 because Defendant was not paying attention to him and made the wrong decisions. (Id. p 134) Defendant admitted he was not truthful during the three interviews he gave, but said the last one was "most truthful". (Id. p 136)

During the first interview Defendant felt that it was possible his son had drowned. (Id. p 140) He knew at the time that he had been aggressive with his son. (Id. p 141) He believed that sucking on Antonio's cheek was his "affection" towards his son. He did it the same way every time. (Id. p 143) He pinched Antonio as a sign of affection, but now he does not think pinching is okay. (Id. p 144)

The second interview Defendant gave about the "five falls" was largely untrue. (Id. p 147). Then Defendant told the jury yet another story about what occurred on March 24, 2011. After Sheretta left for work he was playing a video game. Antonio was with him and he went to sleep. Defendant left the house at about three and went to Travis' house. He went back home to check on Antonio after about 30 minutes when Travis suggested he do so. Antonio was still asleep, so he went back to Travis' house and stayed for 45 minutes to one hour. (Id. pp150-152) Antonio was waking up so he stayed home with him.

Defendant fed and changed Antonio and played with the Xbox Live. He stayed home the rest of the day until his wife got home around 12 that night. (Id. pp 154-155) Around 10 he decided to take a nap. Defendant and Antonio were laying down on the bed. (Id. p 156) He fell asleep and rolled over on Antonio. He was not on Antonio for 15

minutes as he told Detective Fadly on March 28th, but was on him for a minute or so. It was brief. (Id. pp 157-158) Antonio was not right, he was gasping, he was in distress, having a hard time breathing. (Id. p 159) He performed CPR on him and brought him out of the choking state. He appeared fine. (Id)

Defendant wanted to make sure he was okay so he gave him a bath. He stepped out of the bathroom to get some supplies and he heard a noise that didn't sound right. (Id. p 161) It was a coughing kind of choking sound. (Id. p 162) He was out of the room a minute or two, it was brief. (Id. p 163) Antonio slid down in his baby seat and his whole body was under the water. (Id. p 164) Defendant grabbed Antonio out of the tub. He was in a lot of distress, choking. (Id. p 166) Defendant dropped down to his knees and turned him over and began tapping on his back. (Id. p 167) Defendant turned him over and didn't think it was working. He immediately began doing adult CPR. This was successful. The water came out and he started to breathe. He wasn't choking anymore. (Id. pp 167-168) This was when he struck Antonio. (Id. p 169) He thinks it was less than 15 times and he did not punch Antonio. (Id. pp 169-170)

Defendant could not say if he hit Antonio too hard. (Id. p 171) He believed he was successful at getting him to breathe. (Id. p 171) He did not seem to be in distress and went to sleep. (Id. p 172) When Sheretta came home she looked at him. He was breathing. She did not voice any concern and he was relieved. He went back to Travis' house and he thought Antonio was fine. (Id. pp 173-174)

Defendant acknowledged that when he went back to Travis' house he didn't play games but just sat on the couch because he was "shocked" about what had happened. (Id. p 175) He was not upset. (Id.) Defendant acknowledged he lied during the second

interview, because he was worried about getting in trouble. He denied that he intentionally hurt his son. (Id. p 177)

On cross examination Defendant testified that he had a daughter who was born in 2005 and lives in Alabama. (Id. p 180) He never changed or fed his daughter. He was never alone with his daughter. (Id. p 181-182) He married Sheretta because she was pregnant. (Id. p 183)

Defendant denied that he smoked marijuana at Travis' house the second time he went over there on March 24th, contrary to what he told Detective Fadly on March 28th. He claimed he used marijuana the last time he went over there. (Id. p 185) He denied that Antonio's eyes rolled back into his head after he had rolled over on top of Antonio, again contrary to what he had told Detective Fadly. (Id. p 187)

Defendant said he did not grab Antonio by the face and shake him. He claimed he didn't lie to Detective Fadly, he "wasn't just very truthful." (Id. p 194) He denied dropping his son or hitting him on the side of the tub. (Id. pp 194-195) After the bath, Antonio could not cry but was making a high-pitched whaling sound.(Id. p 195) Defendant agreed that he punched Antonio's sides but that 15 times was an exaggeration. (Id. p 197) He knew better than to punch a child in a vital area, like his stomach. (Id. p 198) He agreed that he told Detective Fadly that before he laid Antonio down he knew he was slipping. He had a hard time sleeping that night. He didn't check the baby when he went to bed at 3 in the morning. (Id. p 199) He actually picked up the phone to call 9-1-1 at one point but did not do it because of what people were going to think. (Id. p 200) He denied squeezing him or hitting Antonio with his knuckles. (Id. p 204) Sheretta had nothing to do with this. He never told her the truth. (Id. p 205)

Defendant denied that there were any bruises on Antonio after performing CPR on him. (Id. p 212)

At the close of proofs, the trial court discussed jury instructions with both counsel. Counsel for Defendant requested a jury instruction on child abuse second degree,⁷ “reckless act”. Defendant argued that he committed a reckless act when he rolled over on the baby, when he left him alone and when he left him in the tub. He argued that the reckless act came first and that begat the serious harm. (Id. p 220) The People argued that the cause of the child’s death was blunt force trauma and was not the result of a reckless act, but Defendant’s intentional actions. The child was not suffocated or drowned, but was killed by blunt force trauma. (Id. pp 223-224) The trial court ruled that the reckless act did not result in serious injury, but the serious injury was caused by blunt force trauma. Defendant admitted that he intentionally punched the child. Therefore, the trial court declined to give the child abuse second degree instruction. (Id. p 224) The trial court instructed on felony murder⁸, second-degree murder⁹, involuntary manslaughter¹⁰, the definition of gross negligence¹¹ and child abuse first degree¹². (Id p 225)

On September 25, 2012 the jury gave Defendant the opinion of the community and found him guilty of first degree child abuse and felony murder. (Tr. 9/25/12, p 78) Defendant now appeals.

⁷ CJI 2d 17.20

⁸ CJI 2d 16.4

⁹ CJI 2d 16.5

¹⁰ CJI 2d 16.10

¹¹ CJI 2d 16.18

¹² CJI 2d 17.18 (The trial court mistakenly called this number 16.18.)

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE BEFORE THE JURY TO SUSTAIN A CONVICTION FOR CHILD ABUSE, FIRST DEGREE.

Defendant's Argument

Defendant is entitled to a new trial where there was insufficient evidence to find for the offense of first degree child abuse and therefore felony murder. Defendant argues that “although the blows were violent” there was no evidence to show he “caused the injuries intentionally or knew his actions would result in serious harm to his son.” (Defendant’s Application, 2-3)

Issue Preservation

“A challenge to the sufficiency of the evidence does not involve judicial discretion, need not be preserved by motion for a new trial, and may be raised for the first time on appeal.” *People v Wright*, 44 Mich App 111, 114 (1972).

Standard of Review

A question of the sufficiency of evidence is reviewed *de novo*. *People v Osby*, 291 Mich App 412, 414 (2011); *People v Patterson*, 428 Mich 502, 514 (1987)..

People’s Argument

To determine whether sufficient evidence was presented to sustain a conviction, the Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508 (1992), modified 440 Mich 1201 (1992). The reviewing court must draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v*

Gonzalez, 468 Mich 636, 640-641 (2003); *People v Nowack*, 462 Mich 392, 399-400 (2000). The appellate court, applying the above standards, reviews the trial court record *de novo* to determine whether there was sufficient evidence to support defendant's conviction. *People v Harverson*, 291 Mich App 171 (2010).

Defendant claims that there was insufficient evidence to convict Defendant of child abuse, first degree. A failure of proof on this charge would, of necessity, result in a failure of proof on the felony murder charge.

Under MCL 750.136b(2), "a person is guilty of child abuse in the first degree if a person knowingly or intentionally causes serious physical or serious mental harm to a child."

The elements of felony murder are (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). *People v. Smith*, 478 Mich. 292, 318–319 (2007); *People v Carines*, 460 Mich 750, 758–759 (1999). Child Abuse in the first degree is one of the felonies specifically enumerated in MCL 750.316(1)(b). Thus, if Defendant committed Child Abuse in the First Degree that resulted in the death of another and had the requisite intent, he is guilty of Felony Murder.

There was no dispute that Antonio Burks had suffered "serious physical harm" as defined by MCL 750.136b(1)(f)¹³. The only dispute centered on whether Defendant

¹³ "Serious physical harm" means any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural

knowingly or intentionally caused the serious physical harm to Antonio which ultimately resulted in his death. The Court of Appeal appropriately concluded that was a “plethora of evidence” that the jury could properly “infer that Defendant knowingly or intentionally caused serious harm to Antonio when he was in defendant’s sole care and custody.” *People v Burks*, ____ Mich App ____ (2014).

There was testimony presented at trial that Defendant was very frustrated in his role as father to and caretaker for Antonio. His ex-wife, Sheretta Lee, testified about the stress in the family. Their relationship began with an unplanned pregnancy which Defendant wanted to terminate. Ms. Lee also had custody of two other small sons who were not Defendant’s children. (Tr. 9/20/12, pp 102-105) Prior to Antonio’s death, Defendant had talked to Ms. Lee about the stress he was feeling. He was frustrated that he could not find a job and provide for the family. He talked about committing suicide by driving off a cliff. Ms. Lee was alarmed and her supervisor called the police. (Id. pp 112-116). Defendant had a hard time coping with Antonio’s crying and became frustrated. He would say “I can’t do this.” Ms. Lee would either take over the child care duties or call on a friend to help. Antonio cried a lot. Defendant and Ms. Lee argued about money a lot. (Id. pp 122-126) On the morning of March 24, 2011 Defendant was again expressing his frustration about his employment situation. He was so angry that he punched holes in the walls and told Ms. Lee: ‘that could have been you.’ Ms. Lee asked Defendant if he was okay to care for Antonio. (Id. pp 127-130) Clearly he was not okay

hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut. MCL 750.136b(1)(f).

to assume that task as his frustration and rage boiled over, resulting in the brutal beating of his infant son.

Defendant left Antonio alone in his townhouse while he played video games with Travis Parris. Mr. Parris had to prompt Defendant to go home and check on the child. (Id. pp 63-64) The testimony of the People's witnesses supports a time – line that Defendant actually beat Antonio during the time when he went home to check on him. Brianna Nielson testified that she called Defendant and he was crying, he said something was wrong and that he had to get to the hospital and hung up. He was very frantic, crying and hard to understand. (Tr. 9/18/12, p 24) She reviewed the times of her phone calls to Defendant contained in phone records obtained by Detective Phelps and she did not dispute the times. (Id. p 26) Based on those records, that conversation between Ms. Nielson and Defendant occurred at 5:05 p.m. By that time Defendant had already injured Antonio, yet he failed to call for help and instead pretended that nothing had happened.

There was substantial evidence that Antonio had been dead for some time prior to police arrival at 10:30 a.m. The observations of everyone who came in contact with Antonio the morning of March 25, 2011 corroborated this fact. The first responders Lt. Wriggelsworth and Officer Sexton both observed that the baby was very cold. (Id. pp 73, 102) The paramedics noticed the same thing. Nathan Gates testified that the baby was very cold. (Id. p 14) Peter Counseller testified that in 20 years of work as a medic he had never seen a child that was so cold. (Id. pp 34-36) In the emergency room, Antonio's body temperature was so low that it did not register on the thermometer, which goes as low as 92°. Dr. Romero testified that a temperature below 92° is

“inconsistent with life.” (Tr. 9/20/12, pp 17, 55) All of these professionals saw no signs of life in Antonio. Dr. Romero testified that, based on this lack of responsiveness, lack of corneal reflection, the beginning of opacification of the corneas, and his low body temperature, Antonio had been dead from 4-6 hours up to 12 or even 24 hours. (Id. pp 21-25, 53) Even Antonio’s mother believed he was dead when she first touched him on that morning. (Id. pp 155-156)

Defendant knew that he had injured his baby son out of his own frustration and rage. This was evident in his failure to seek assistance for Antonio. He pretended Antonio was fine when Sheretta Lee arrived home the night of March 24, 2011, yet his guilt was evident to Ms. Lee because Defendant’s behavior was unusual. His mood was unusual and he warned her against touching Antonio. (Id. pp 133-137) When Defendant returned to the Parris home to play video games after Sheretta arrived home, Travis Parris also noted that Defendant’s behavior was “not normal”. (Id. p 63) If Antonio’s death had been a surprise, as described by Defendant, Antonio would likely have had a dirty diaper.¹⁴ Yet Antonio was completely clean and powdered. Defendant had put him in his bed as if nothing had happened. This is further evidence that Defendant was aware of Antonio’s true condition and attempted to conceal it.

Instead of seeking any real assistance for Antonio, Defendant engaged in theatrics when emergency personnel responded, yelling out the window, doing adult CPR on a baby and punching holes in the walls. (Tr. 9/18/12 pp 64-74; 95-96, 106) These antics continued at the hospital. (Id. pp 112-114) Yet Defendant never gave any

¹⁴ Dr. Romero’s testimony, id. pp 37-39; Paramedic Peter Counseller’s testimony. (Tr. 9/18/12, pp 36-37)

information about any accident to the emergency responders or doctors who were in a position to help his son.¹⁵ It can be inferred that Defendant knew it was too late.

Defendant concocted numerous elaborate lies about what happened starting with the story he gave during his ride to the hospital with Officer Sexton¹⁶. He continued to try to lie his way out of his predicament through three different statements to Detective Fadly and another variation during his trial testimony. It is clear from all of this testimony, summarized above in the Counterstatement of Facts, that Defendant modified his version of the events as more information became known about the nature and extent of Antonio's injuries. His claim that Antonio died because of his own inappropriate response to a tragic accident is not borne out by Defendant's behavior, which illustrates his own consciousness of guilt.

The most damning evidence of the nature of Defendant's actions came from the forensic pathologist. Dr. Bechinski testified to numerous external and internal injuries on Antonio's body. Antonio was a six month old infant who was 27 inches long and weighed only 14 pounds. (Tr. 2/20/12, pp 208, 223) He had bruises all over his body and the frenulum was torn.(Id. p 217) Injury to the frenulum is seen in suffocation deaths and could have been caused by someone trying to quiet the crying baby by covering his mouth.(Id. p 220) Antonio's body looked like a "text book" battered child. (Id. p 223)

Internally, there was bleeding in two places below the scalp. (Id. pp 224-226) There was a "full thickness tear" of the superior vena cava. This is the type of injury

¹⁵ Defendant said nothing about an accident to Lt. Wriggelsworth, (Tr. 9/18/12, pp 74-75, 85) or to Officer Sexton who drove Defendant to the hospital and waited in the treatment room with Defendant (Id. pp 108, 109, 112-113); nor did he tell the E.R. physician, Dr. Romero. (Tr. 9/20/12, p 21)

¹⁶ Defendant told Officer Sexton he gave the baby a bath and a bottle at 11:00 p.m. (Tr. 9/18/12, pp 108-109)

commonly seen in a high-speed motor vehicle collision and was sufficient to cause death. (Id. pp 227-228) Antonio's liver was lacerated in four places, his spleen was lacerated in two places, his right adrenal gland was "pulpified" and his left testicle was surrounded by a thick hemorrhage. He also had bruises on the diaphragm, thymus, the ascending and transverse colon and on the duodenum. There was also evidence of bleeding into the abdominal cavity. (Id. pp 228-229) The injured organs were on both the left and right side of the body. These injuries were caused by multiple "blunt force trauma." (Id. pp 231-234) These injuries did not result from inappropriate CPR which would not have affected the head, testicles or legs. (Id. pp 237-238) They could not have occurred after death. (Id. pp 245-246) Even Defendant admitted that he knew better than to punch a child in a vital area, like his stomach. (Tr. 9/24/12 p 198)

Viewing the evidence in the light most favorable to the People, and making all inferences and credibility choices in support of the jury verdict, there was sufficient evidence to support the jury verdict. *Gonzalez, supra*. In fact, there was overwhelming evidence in favor of the jury verdict. A rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Wolfe, supra*.

II. THE TRIAL COURT DID NOT ERR WHEN IT DID NOT INSTRUCT THE JURY ON THE CHARGE OF CHILD ABUSE, SECOND DEGREE.

Defendant's Argument

Defendant is entitled to a new trial where the trial court declined to instruct the jury as to second degree child abuse as requested by the defense where there was evidence to support such instruction. Failing to instruct the jury as to second-degree child abuse was not harmless error as decided by the Court of Appeals.

Issue Preservation

The issue was preserved by Defendant who requested an instruction on child abuse, second degree.

Standard of Review

"[A] trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113 (2006), quoting *People v Hawthorne*, 265 Mich App 47, 50 (2005). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460 (2008).

People's Argument

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Hawthorne*, 474 Mich 174, 182 (2006), quoting *People v Rodriguez*, 463 Mich 466, 472 (2000). The trial court may provide an instruction when the evidence presented at trial supports giving that instruction. *People v Johnson*, 171 Mich App 801, 804 (1988). Jury instructions must fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124

(2001). The instructions must include all elements of the charged offenses, and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606 (2005).

In reviewing claims of error in jury instructions, this Court examines the instructions in their entirety. *People v Milton*, 257 Mich App 467, 475 (2003). Even if the jury instructions are not perfect, a new trial is warranted only if the instructions did not fairly present the issues to be tried or did not sufficiently protect the defendant's rights. *Id.* Instructional error may not be the basis for a reversal absent a miscarriage of justice. MCL 769.26.

The charge of child abuse, first degree requires proof that the defendant intended to commit the act and that he intended to cause serious physical harm *or* knew that serious physical harm would result from his act. *People v Maynor*, 470 Mich 289, 297 (2004). "We find it is unnecessary for the jury to be given further instruction on "specific intent," such as that found in CJI2d 3.9. The need to draw the common-law distinction between "specific" and "general" intent is not required under the plain language of the statute, as long as the jury is instructed that it must find that defendant either knowingly or intentionally caused the harm." *Maynor*, *id.* p 296.

The trial court properly concluded that the evidence did not support the giving of the child abuse, second degree instruction. The facts of the case simply do not support Defendant's contention that this was a reckless act. In reaching this conclusion, the trial court had substantial evidence of Defendant's intent, based on the nature and extent of the injuries to Antonio and based on Defendant's failure to seek medical treatment for Antonio immediately, as one would expect from someone who hurt a child in an

accidental or reckless manner. Intent can be inferred by looking at Defendant's actions, and the means and manner employed by him to commit the act. *People v Hawkins*, 245 Mich App 439, 458 (2001)

The injuries incurred by Antonio were the result of blunt force trauma. As observed by Dr. Bechinski, the injuries he saw on Antonio are usually seen in high speed motor vehicle accidents. (Tr. 9/20/12, pp 227-228) Dr. Romero similarly observed that the purple discoloration around the umbilicus called "Cullen's sign" indicates internal bleeding and is seen in motorcycle accidents. (Id, pp 14-15, 31-33) There was significant force inflicted upon Antonio's small body by Defendant. In this case, Defendant's acts were the equivalent of a speeding motor vehicle. His state of mind was evident based on the numerous blunt – force injuries all over Antonio's body.

These must also be viewed in the context of evidence about Defendant's demonstrated feelings of personal frustration and rage. The very morning that Defendant inflicted these numerous, severe injuries on Antonio, he had punched holes in the walls of the family home and made threatening comments to Sheretta Lee. (Id. pp 127-130) Defendant had made suicidal comments and driven carelessly with the children in the past. (Id. pp 112-116) It is clear based on the evidence of Defendant's state of mind that morning, as testified to by Ms. Lee and his comments to her as he punched holes in the wall that "this could be you" that he was ready and able to inflict such pounding injuries on someone. In light of the nature and extent of Antonio's injuries, it is clear that Defendant repeatedly and forcefully pummeled this small child's body. Defendant admitted in his testimony that he knew better than to punch a child in a vital area, like their stomach. (Tr. 9/24/12, p 198) Yet this is exactly the area where

Antonio sustained multiple blunt force trauma of sufficient force to lacerate his liver and spleen, 'pulpify' his adrenal gland and bruise many other organs. (Tr. 9/20/12, pp 228-229) The evidence simply did not support a theory consistent with recklessness.

The trial court was also faced with Defendant's ever – changing version of what occurred. The *only* evidence that Antonio's injuries were the result of recklessness, came from Defendant's constantly shifting story. The decision of the trial court was based on a rational view of the evidence. *People v Cornell*, 466 Mich 335 (2002) In *Cornell*, the court observed that an appellate court must look at the evidence that was offered to support the greater offense. *Id.* at 365. In this case, the only substantial, credible evidence is that which supports the greater offense. The trial court did not abuse its discretion when it decided that there was not enough evidence to justify the giving of a jury instruction on the charge of child abuse, second degree.

Assuming *arguendo* that the trial court erred in failing to instruct the jury on the charge of child abuse, second degree. Defendant has failed to meet the burden of showing that it was more probably than not that the jury would have convicted him of second-degree child abuse.

Defendant suggested in his testimony that the reckless act was his inept attempts at CPR. This was directly contradicted by the testimony of Dr. Bechinski, that the injuries to the child's head, legs and testicles could not have been the result of inappropriately administered CPR. It was Dr. Bechinski's opinion that none of the injuries he saw were the result of inappropriate CPR. (*Id.* pp 237-238) Dr. Romero also expressed his opinion that it was very unlikely that the injuries he saw were caused by the improper administration of CPR. (*Id.* p 47) It was Dr. Bechinski's conclusion that the

injuries he saw were caused by squeezing, punching, shaking or striking a wall. (Id. p 240)

In addition, the jury was unlikely to believe Defendant's "reckless" theory in light of the testimony establishing Defendant's history of violence, the anger and violence he exhibited on the morning before Antonio died, and the evidence that Defendant was growing more flustered when attempting to calm a baby who cried often.

While the People believe the trial court did not err in declining to instruct the jury as to second-degree child abuse, the Court of Appeals properly determined that

a review of the entire cause does not show that Defendant merely committed an act likely to cause serious harm, regardless of actual harm or that the Defendant acted recklessly, not knowingly in causing injury [to] Antonio. As such, the trial court's failure to instruct the jury on the necessarily included lesser offense of second-degree child abuse did not undermine the reliability of the verdict and that failure was harmless. [*People v Burks*, ___ Mich App ___ (2014)]

RELIEF REQUESTED

WHEREFORE, the People respectfully request that this Court deny Defendant's Application for Leave to Appeal.

Dated: 02/26/2015

/s/ Nicole Matusko
Nicole R. Matusko (P72136)
Assistant Prosecuting Attorney
303 W. Kalamazoo St., 4th Floor
Lansing, Michigan 48933

CERTIFICATE OF SERVICE

On February 26, 2015, I served a copy of People's Response to Defendant's Application for Leave to Appeal by first-class mail addressed to:

Yumar Burks (MDOC #854502)
Macomb Correctional Facility
34625 26 Mile Rd.
New Haven, MI 48048

I declare that the statements above are true to the best of my knowledge, information, and belief.

/s/ Lisa Renee Davis
Lisa Renee Davis